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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940.

No.———

MABEL C. HERMAN,
dba Herman Oil Company,
PETITIONER,

vs.

TRAVELERS MUTUAL CASUALTY COMPANY,
a Corporation,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of Mabel C. Herman, doing business as Herman Oil Company, respectfully shows to this Honorable Court:

The United States Circuit Court of Appeals, Eighth Circuit, pursuant to opinion filed December 12, 1940, as corrected on denial of rehearing, January 6, 1941, 116 Fed. 2d. 152, (R. 147), reversed the judgment of the United States District Court for the District of Nebraska, Omaha Division, in favor of Mabel C. Herman, defendant, against the Travelers Mutual Casualty Company, plaintiff, and held that the District Court had erred in sustaining de-

fendant's motion for a directed verdict and ordered the cause remanded for trial. The Circuit Court of Appeals also held the appellant's notice of appeal to be adequate to invoke appellate jurisdiction of the Circuit Court under Rule 73 (b) of the Rules of Civil Procedure. (Note 1, Travelers Mutual Casualty Company vs. Herman, 116 Fed. 2nd. 152; R. 147)

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is a contract action brought by respondent, the Travelers Mutual Casualty Company against the petitioner, Mabel C. Herman, doing business as Herman Oil Company. The purpose of the action is recovery under a reimbursement agreement contained in an automobile insurance policy, issued by respondent to petitioner. Under the terms of the policy, the respondent had been compelled to pay a judgment rendered against itself and petitioner, the insured, under such circumstances as the respondent claims the reimbursement provision of the policy is rendered operative, and that as a consequence, petitioner owes a duty of reimbursement to the respondent. (R. 1-5)

At the conclusion of the plaintiff's evidence, the District Court sustained petitioner's motion for a directed verdict and demurrer to the evidence and judgment was entered thereon in favor of the petitioner. (R. pp. 42, 141)

The facts of the case briefly presented, are as follows:

Respondent is an insurance company engaged in writing automobile insurance. Petitioner is engaged in the business of transporting petroleum products for hire by trucks, operating in Kansas and Nebraska.

On September 3, 1937, respondent issued to petitioner an automobile insurance policy covering a particularly described and specified unit, a G. M. C. tractor No. 239 R 1126 and Fruehauf semi-trailer No. 34551, (R. 9, 54). It was understood between petitioner and respondent that petitioner would be operating the truck in Kansas, as well as in Nebraska, and that the policy would have to conform with the provisions of the applicable Kansas statutes, and regulations of the Kansas Corporation Commission. (R. 2, 27)

The State of Kansas required that an insurance policy, written on a public or contract carrier, contain a waiver of description endorsement, thereby making a policy on any particularly described unit a blanket or elastic coverage policy embracing any and all units operated by the carrier, whether specifically described in the policy or not. Section 66-1,128, Gen. Stat. of Kan. 1935, page 1577, reads as follows:

> "No certificate or license shall be issued by the public service commission to any 'public motor carrier of property', 'public motor carrier of passengers', or 'private motor carrier or property', until and after such has been approved by, the public service commission, a liability insurance policy in some insurance company or association authorized to transact business in this state, in such reasonable sum as

> the commission may deem necessary to adequately protect the interests of the public with due regard to the number of persons and amount of property involved, which liability insurance shall bind the obligors thereunder to pay compensation for injuries to persons and loss of or damage to property resulting from the negligent operation of such carrier. No other or additional bonds or licenses than those prescribed in this act shall be required of any motor carrier by any city or town or other agency of the state."

Rule 24 of the Kansas Corporation Commission, promulgated under authority of the above quoted statute, made mandatory the endorsement which reads:

> "It is further understood and agreed that the company waives a description of the motor vehicles, trailers or semi-trailers insured hereunder and the policy is hereby amended and extended so as to cover any and all motor vehicles, trailers, and semi-trailers operated or used by the assured pursuant to the certificate, permit or license issued by the State Corporation Commission of Kansas." (R. 133)

Pursuant to the Kansas requirements therefor, there was included in the policy issued by respondent to petitioner, the necessary waiver of description endorsement. (R. 27)

In addition, there was what is commonly called a reimbursement clause attached to the policy which reads as follows:

> "For Statutory Policies—Interstate Operations—Public Automobiles—It is hereby understood and agreed that the provisions of any Statutory or Public Automobile Endorsements attached to and/or made a part of this policy, shall apply only in connection

with accidents occurring in the states in which the provisions of such endorsements are specifically applicable. All accidents occurring outside of such state shall be adjusted in accordance with the policy contract irrespective of any conditions or limitations in any of the said statutory endorsements; and further that the Company shall be reimbursed by the Assured for any and all loss, costs, or expenses paid or incurred by the Company and which the Company would not be obliged to pay under the provisions of the policy independently of any statutory provision of this policy and/or any endorsement thereto." (R. 21)

On September 23, 1937, a truck operated by petitioner and not specifically described in the policy in question, nor in any policy then and there outstanding between respondent and petitioner, crashed into the side of a Chicago, Rock Island and Pacific Ry. freight train in Riley County, Kansas. The Railway Company brought suit against respondent and petitioner, as joint defendants, and recovered a judgment for $3,252.92, with interest and costs, which judgment the respondent paid, and satisfied, being a total of $3,677.42 to cover the judgment, interest, costs, attorneys' fees and preparation for trial. (R. 82-92)

Respondent claims reimbursement from Mabel C. Herman for this amount, under the terms of the reimbursement endorsement.

At the time of hearing in the Circuit Court of Appeals, the court raised the question of the adequacy of the notice of appeal to invoke the appellate jurisdiction of the court.

The notice of appeal, omitting formal parts, reads as follows:

> "Notice is hereby given that the Travelers Mutual Casualty Company, a corporation, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Eighth Circuit, from the Court's order directing a verdict in favor of defendant entered in this action on 9th day of April, 1940, and from the verdict so directed on said day." (R. 44)

Time was granted for the purpose and both parties submitted memoranda on the jurisdictional question. The notice of appeal was held to be adequate. (R. 147)

B.

JURISDICTION.

1. The jurisdiction of this court is believed to be sustained under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1924, C. 229, 43 Stat. 936. (28 U. S. C. A. Sec. 347 (a).)

2. The date of the judgment to be reviewed is December 12, 1940, rehearing denied and opinion modified January 6, 1941. (R. 146, 161)

3. The following cases are believed to sustain the jurisdiction:

> United States v. Gulf Refining Co., 268 U. S. 542, 69 L. Ed. 1082.
>
> Erie Railroad Company v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188.

C.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The decision of the court upon the question of jurisdiction is in conflict with the decision of the Circuit Court of Appeals, Fifth Circuit, in Carter, et al. v. Powell, et al., 104 Fed. 2d. 428; Rehearing denied, 104 Fed. 2d. 1012; Certiorari denied, 308 U. S. 611, and calls for the exercise of this Court's power of supervision.

2. The case decides an important question of local law probably in conflict with applicable local decisions; viz., Dunn v. Jones, et al., 143 Kan. 218, 53 P. (2d) 918, and the Rules of the Kansas Corporation Commission, the administrative agency charged with the enforcement of the Kansas Motor Carrier Act.

WHEREFORE, YOUR PETITIONER RESPECTFULLY PRAYS, that a writ of certiorari be issued out of, and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals, Eighth Circuit, commanding that court to certify and to send to this court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, "11,761 Civil, Travelers Mutual Casualty Company, a Corporation, Appellant v. Mabel C. Herman, doing business as Herman Oil Company, Appellee"; and that said judgment of the Circuit Court of Appeals may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the

premises as to this Honorable Court may seem meet and just, and your petitioner will ever pray.

MABEL C. HERMAN,
dba Herman Oil Company,

By J. E. ADDINGTON,
Topeka, Kansas,

HOWARD A. JONES,
Topeka, Kansas,

JOHN C. MULLEN,
Omaha, Nebraska,

Counsel for Petitioner.

ROBERT STONE,
Topeka, Kansas,

Of Counsel and Member of the
Bar of the Supreme Court of the
United States.